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No. 80-5950

# In the Supreme Court of the United States

OCTOBER TERM, 1980

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LAVERNE L. LOGAN, APPELLANT,

*v.*

ZIMMERMAN BRUSH COMPANY, APPELLEE.

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*APPEAL FROM THE SUPREME COURT OF ILLINOIS*

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## JOINT APPENDIX

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GARY H. PALM
MARK C. WEBER
*Edwin F. Mandel Legal Aid Clinic*
*University of Chicago Law School*
*6020 South University Avenue*
*Chicago, Illinois 60637*
*(312) 324-5181*
*Counsel for Appellant*

JAY A. CANEL
*Rudnick & Wolfe*
*30 North LaSalle Street*
*Suite 2800*
*Chicago, Illinois 60602*
*(312) 368-4095*
*Counsel for Appellee*

**APPEAL DOCKETED DECEMBER 27, 1980**
**PROBABLE JURISDICTION NOTED FEBRUARY 23, 1981**

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**STATE OF ILLINOIS**
**FAIR EMPLOYMENT PRACTICES COMMISSION**

*Chicago Office:*
179 W. Washington
Chicago, IL 60602–312/435-6200

*Springfield Office:*
3 W. Old State Capitol Plaza-Myers Bld. 2nd
Springfield, IL 62701–217/782-1927

FOR OFFICE USE ONLY

Date Filed: 11/14/79
No. 1980CN0680

CHARGE OF UNFAIR EMPLOYMENT PRACTICE

I, Mr. Laverne L. Logan, 124 North Parkside Avenue, Chicago, Illinois 60644, (312) 276-3911, charge on my own behalf to have been personally aggrieved by an unfair employment practice committed by Zimmerman Brush Company, 900 West Lake Street, Chicago, Illinois 60608, (312) 829-3262, on the 9th day of November 1979 at Chicago (Cook) because of my Physical Handicap—short left leg.

The facts of the alleged unfair employment practices are:

I. On 11/9/79, I was terminated from my position of Shipping Clerk. I was hired on October 9, 1979.

II. The reason given for my termination by the Superintendent, Mr. Weber, was my performance.

III. I believe that I have been discriminated against because of my physical handicap, short left leg, in that:

A. When I was informed by the Superintendent that I was terminated because of my performance, I questioned the Foreman of the 4th Floor, Flo, since I was never warned that my work was unsatisfactory. Flo informed me that the reason the Superintendent gave him for my termination was because he had seen me setting down on several occasions.

B. Respondent was aware of my handicap and that was the reason I sat down instead of walking around like the rest of the employees when the line was full.

Mr. Laverne L. Logan, on oath or affirmation states that he is the complainant herein, that he has read the foregoing charge and knows the contents thereof, and that the same are true and correct to the best of his/her knowledge.

/s/ _____
LAVERNE L. LOGAN
*Signature of Complainant*

SUBSCRIBED and sworn to before me this 14th day of November 1979 at Chicago, Illinois

/s/ _____
Notary Public

## CHRONOLOGICAL LIST OF RELEVANT DATES

| | |
|---|---|
| November 14, 1979 | Laverne Logan's Charge of Unfair Employment Practice filed with the Illinois Fair Employment Practices Commission |
| January 28, 1980 | Notice of Fact Finding Conference and Questionnaire sent to Zimmerman Brush Company |
| March 7, 1980 | Zimmerman Brush Company's Answer to Questionnaire filed with the Illinois Fair Employment Practices Commission |
| March 18, 1980 | Fact finding conference convened; Zimmerman Brush Company's Motion to Dismiss filed |
| March 22, 1980 | Zimmerman Brush Company's Petition for Writ of Prohibition filed with the Supreme Court of Illinois |
| March 25, 1980 | Order entered by Supreme Court of Illinois granting leave to file Petition for Writ of Prohibition and staying proceedings before the Fair Employment Practices Commission |
| April 30, 1980 | Laverne Logan's Second Charge of Unfair Employment Practice filed with the Fair Employment Practices Commission |
| May 29, 1980 | Oral argument heard in the Supreme Court of Illinois |
| September 29, 1980 | Writ of Prohibition awarded |

| | |
|---|---|
| December 27, 1980 | Laverne Logan's Jurisdictional Statement docketed with the Supreme Court of United States |
| February 23, 1981 | Probable jurisdiction noted by the Supreme Court of the United States |

**STATE OF ILLINOIS**

**Fair Employment Practices Commission**

CENTRAL OFFICE: 179 WEST WASHINGTON STREET, 4TH FLOOR • CHICAGO, ILLINOIS 60602 312/793-6200
REGIONAL OFFICE: 3 WEST OLD STATE CAPITOL PLAZA, MYERS BUILDING, 2ND FLOOR
SPRINGFIELD, ILLINOIS 62701 217/782-1927

January 28, 1980

Re: Charge Number: 1980CN0680

Mr. Howard L. Mocerf, Attorney
Borovsky, Ehrlich & Kronenberg
120 South LaSalle Street—Suite 1820
Chicago, IL 60603

Complainant: Laverne L. Logan

Respondent: Zimmerman Brush Company

**NOTICE OF FACT FINDING CONFERENCE**

You are hereby required to appear and participate in a Fact Finding Conference scheduled for March 18, 1980, at 9:30 a.m. at 179 W. Washington, 4th Fl, Chicago. Said conference will be conducted by the Commission representative whose name and telephone number appears at the bottom of this notice.

The Fact Finding Conference is an investigative forum intended to define the issues, determine which facts are undisputed, obtain evidence, and ascertain whether there is a basis for a negotiated settlement of the charge. An attorney or a friend may accompany you to the conference. However, you may not send a substitute for yourself or bring persons whose presence has not been requested by the Commission, without first receiving express permission to do so from the Commission representative.

Preliminary to and as a necessary part of the conference, you are requested to answer any questionnaire which may be attached to this notice and return it to the Commission representative by March 10, 1980. In addition, you may submit a written statement of your position with respect to this

charge, including a proposal for settling the charge. Such information will be made a part of the file and will be considered by the Commission during the course of its investigation, except that all settlement discussions will be treated as confidential and will not be used as evidence in this or subsequent proceedings without the written consent of the parties.

The Commission encourages the parties to settle this charge prior to the Commission's determination as to whether the allegations made in this charge are supported by substantial evidence. If the parties reach a settlement, the same shall be reduced to writing, signed by the parties and submitted to the Commission for approval. If so approved, the Commission shall thereupon enter an order incorporating the terms of settlement and dismissing the charge pursuant thereto without making a finding on the merits of the charge.

All correspondence concerning this charge should refer to the charge number referred to above. Furthermore, all correspondence and/or questions should be directed to the below named Commission representative who has been assigned to conduct the Fact Finding Conference.

DOLORES NEIGHBORS
*(NAME)*
*793-6272*
*TELEPHONE NUMBER*

Enclosures: Copy of Charge
Questionnaire
Revised 12/78/sp

Charge No. 1980CN0680
Complainant Laverne L. Gogan
Respondent Zimmerman Brush Company

**DISCHARGE/HANDICAP/QUESTIONNAIRE**

NOTE: If Respondent employs fewer than 15 employees in the State of Illinois, please contact the investigator whose

name appears on the attached notice immediateiy. Do not proceed with the questionnaire until such time as you have spoken with the investigator.

1. State the full legal name and address of Respondent named herein, and describe briefly the type of business or work carried on by Respondent at this address.

2. State the name, title, and telephone number of the individual from whom further information concerning the charge may be obtained.

3. If Respondent employs 100 or more persons, please attach a copy of the most recent EEO-1 Report for the location in question.

4. Submit a copy of Respondent's discharge policy.

5. Submit a detailed explanation of discharge procedures including, but not limited to:

a. Appeal rights.

b. Availability of these procedures to employees.

c. Persons in authority to effect a discharge, either by final decision or recommendation.

d. Extent of union involvement.

e. Applicable collective bargaining agreements. (Submit Copies.)

6. Submit the following personnel data on Complainant:

a. Date of hire. (Include the employment application.)

b. Position(s) in which Complainant was employed. (If more than one, list each and the relevant dates.)

c. Copies of other personnel records relevant to the Complainant, including but not limited to:

—Work quality evaluations.
—Attendance records.
—Disciplinary records.

7. State whether Complainant was discharged. If yes, submit:

a. Date of discharge. (Include the discharge notice.)

b. Reason for discharge.

c. Statement of whether Complainant made use of any appeal rights.

d. Name and position of the person making the final decision to discharge Complainant. Attach a copy of any evaluation or investigation report relating to the discharge.

e. Names of witnesses to each event which contributed to the discharge.

8. Submit the name, title, date of hire, discharge date, and reason for discharge, of all persons terminated from employment by Respondent in the preceding twelve months. (Include discharge notices.)

9. State whether it is Respondent's policy to make periodic or other evaluations of an employee's job performance. If so, indicate by whom these evaluations are made, how often they are made and the scope of such evaluations.

10. State the basic requirements for the position which Complainant held. Indicate how Complainant was deficient in such requirements.

11. Was Complainant's handicap a factor in the dismissal? If so, explain how.

12. Was any attempt made to accommodate the Complainant's handicap by altering physical structures, modifying job duties or transferring Complainant to another position? If yes, explain and provide documentation if available.

13. Was Complainant required to undergo a physical examination prior to dismissal? If yes, who conducted the examination and what were the results?

14. List all positions open at the time of Complainant's discharge and attach a job description for each.

15. Submit a statement of Respondent's position on the instant charge. Provide any additional information Respondent feels will aid the Commission in arriving at an objective and just resolution of the issues presented herein.

ZIMMERMAN BRUSH CO.
900 West Lake Street ▪ Chicago, Illinois 60607 U.S.A.
Phone: (312) 829-3262

March 7, 1980

Fair Employment Practices Commission
179 W. Washington St.
4th Floor
Chicago, Illinois

Attention: Miss Dolores Neighbors

Re: L. Logan
#1980CN0680

Dear Miss Neighbors:

1. ZIMMERMAN BRUSH Co., 900 West Lake Street, Chicago, Illinois 60607

2. James Weber, Plant Superintendent—Telephone 829-3262

3. See Howard Mocerf—Attorney for ZIMMERMAN BRUSH CO.

4. See UNION CONTRACT PAGE 13, Section 4. Probationary Employees, Applicable to Complainant.

5. (A) Non Union Employees (Probationary) Have No Appeal Rights. as per Union Contract.

(b) Appeal Rights available to Union Employees Only.

(C) Foreman of Department, Plant Superintendent and Vice President and President of company.

(D) None

(E) None

6. See Attached.

7. See Attached.

8. See Attached

9. Probationary Employees evaluated within first 30 days if not found suitable for position, terminated as per Section 4—Page 13 Union Contract.

10. U.P.S. Shipping Clerk: Loading, Packaging, Banding and taking care of Customer Pick ups.

Couldn't handle physical requirements of job, including significant amount of walking.

11. No.

12. Complainant told Company that he could not handle the amount of walking to do the U.P.S. Shipping Clerks Job. In a good faith attempt to accomodate the complainant he was transfered to a branding line position where little or no walking was required. agreed by cp.

13. No

14. No other jobs available at time, Employee was moved to new department to try and accommodate him.

15. In a good faith attempt to accommodate the complainant he was moved to the branding line job. This is not the first time the company has tried to help handicapped personnel.

In another recent situation concerning a handicapped employee said employee was moved from a material handling position, to a machine operators position, to mechanic-set-up man. (a highly skilled job) in order to improve and make more secure his position with the company. Said employee is now fully trained and secure within his position with the company.

Other handicapped and disadvantaged people were found and employed by the company in an effort to help such individuals. You will find the company has worked closely and harmoniously with the following organizations.

The Department of Vocational Rehabilitation (Mr. Brimston)

Jobs for Vietnam Veterans (Mayors Office, Mr. Mack)

Commonwealth of Puerto Rico (Department of Labor—Mrs. Bernios)

Indian Employment Center of Chicago (Ms. Morgan)

Centro Latino, Una Puerta Aberta (Mr. Herraro)

Although we sincerely tried to help the complainant, he could not handle the physical requirements or the expertise required of either position given to him.

The company regrets being forced to terminate the complaintant but found it necessary in light of job requirements.

It may be added, that although complaintant was seen on several occasions literally sitting down on the job, this was in great part overlooked by the company. However, when it was determine that complainant was unable to do his job the company had no choice but to terminate him.

Yours very truly,

ZIMMERMAN BRUSH COMPANY

/s/ _____

JAMES WEBER

*Plant Superintendent*

JW/cf

**BEFORE THE ILLINOIS FAIR EMPLOYMENT PRACTICES COMMISSION**

Charge No. 1980 CN 0681

LAVERNE L. LOGAN, COMPLAINANT,

*v.*

ZIMMERMAN BRUSH COMPANY, RESPONDENT

**MOTION TO DISMISS**

The Respondent, ZIMMERMAN BRUSH COMPANY, by its counsel, BOROVSKY, EHRLICH & KRONENBERG, respectfully moves the Fair Employment Practices Commission to dismiss the charge in this matter because the Commission is without authority under the Fair Employment Practices Act to proceed further. In support thereof, Respondent states as follows:

1. The Claimant's charge of employment practice discrimination was filed on November 14, 1979. (A copy of the charge is attached as Exhibit A.) A fact finding conference related thereto was scheduled by the Illinois Fair Employment Practices Commission to convene on March 18, 1980, more than 120 days after the Complainant's charge was filed. (A copy of the Notice of Fact Finding Conference is attached as Exhibit B.)

2. Section 8(b), 48 S.H.A. §858(b), of the Illinois Fair Employment Practices Act, 48 S.H.A. §851 *et seq.*, unequivocally states that the Fair Employment Practices Commission (hereinafter called "FEPC" or "Commission") "shall" convene a fact finding conference within 120 days of the proper filing of a charge alleging the commission of a discriminatory employment practice. Section 8(b) of the Fair Employment Practices Act was in effect both at the time that the Complainant's charge was filed and on March

18, 1980, the date scheduled by the FEPC for the convening of the fact finding conference.

3. The requirement that the FEPC convene a fact finding conference within the 120-day period prescribed in Section 8(b) of the Fair Employment Practices Act is mandatory by its express terms. The word "shall" in Section 8(b), by definition, imposes an unequivocal and compulsory duty upon the Commission to convene a fact finding conference within the statutory 120-day period.

4. The sponsors of the bill which amended the Fair Employment Practices Act to include Section 8(b) clearly intended to impose a compulsory obligation on the FEPC to convene a fact finding conference within 120 days of the proper filing of a charge. Thus, Represesentative Dan Houlihan, sponsor of the Bill in the House, stated, "What the Bill [House Bill 2875] would do would be to provide that subsequent to the applicable time period within which an agreed [sic] party may institute a complaint with the Fair Employment Practices Commission, that the Commission *shall* convene a fact finding [conference] . . . [within] a period of a hundred and twenty days . . .". H.B. 2875, 80th G.A., Reg. Sess., 134th day at 7 (1978) (emphasis added). Senator Guidice, sponsor of the Bill in the Senate, stated, "What this bill intends to do is to *require* the Commission to convene a fact finding conference within a hundred and twenty days after charges have been filed . . .". H.B. 2875, 80th G.A., Reg. Sess., 142nd day at 13 (1978) emphasis added).

5. That the timely convening of a fact finding conference by the FEPC is a mandatory requirement is conclusively established by comparison of the language of Section 8(b) of the Fair Employment Practices Act with Section 7.102(c)(3) of the newly enacted, not yet effective, Illinois Human Rights Act. In the prospective Human Rights Act, the Illinois General Assembly has provided that fact finding conferences "may" be conducted by the Human Rights Commission, thus conferring upon that Commission the discretionary authority to convene such conferences. The General Assembly's use of the word "shall" in the Fair Em-

ployment Practices Act and its use of the word "may" under the similar provision of the prospective Human Rights Act clearly confirms that the legislature understood the 120-day period specified in Section 8(b) of the Fair Employment Practices Act to be mandatory.

6. That the FEPC must convene a fact finding conference within 120 days of the proper filing of a charge is further confirmed by recent decisions of the Illinois Supreme Court. The Court has held that where the Act requires that the FEPC "shall" take certain action within a specified period of time, the directive of the Act is mandatory and the failure of the FEPC to act within the specified time deprives the Commission of jurisdiction over the matter. *See Board of Governors v. Illinois Fair Employment Practices Commission*, 78 Ill. 2d. 143, ___ N.E.2d. ___ (1979); *Springfield-Sangamon County Regional Plan Commission v. Fair Employment Practices Commission*, 71 Ill. 2d. 61, 373 N.E.2d. 1307 (1978). Section 8(b) of the Act requires that the FEPC "shall" convene a fact finding conference within 120 days of the filing of a charge. Thus, where the FEPC fails to convene such a conference within the prescribed time period, the decisions of the Illinois Supreme Court compel the conclusion that the FEPC is deprived of jurisdiction to further pursue the matter.

7. The FEPC has failed to comply with the mandate of §858(b) of the Fair Employment Practices Act by failing to convene a fact finding conference in the instant case on or before March 13, 1980, the final day of the statutory 120-day period. The FEPC's failure to adhere to this mandatory provision of the Act vitiates the FEPC's authority to require the appearance and participation of Respondent Zimmerman Brush Company at the fact finding conference which the Commission untimely scheduled for March 18, 1980, and the FEPC's statutory jurisdiction to further pursue this matter.

WHEREFORE, for the reasons given above, Respondent Zimmerman Brush Company respectfully moves the Fair Employment Practices Commission to dismiss the dis-

criminatory employment practice charge of Laverne L. Logan filed against Respondent on November 14, 1979.

Respectfully submitted,

/s/ _____
HOWARD L. MOCERF

/s/ _____
THOMAS R. PALMER

*Attorneys for Respondent*
*Zimmerman Brush Company*

*Dated: March 18, 1980*

BOROVSKY, EHRLICH & KRONENBERG
*120 South LaSalle Street*
*Suite 1820*
*Chicago, Illinois 60603*
*(312) 558-1500*

**STATE OF ILLINOIS**

**Fair Employment Practices Commission**

CENTRAL OFFICE: 179 WEST WASHINGTON STREET, 4TH FLOOR • CHICAGO, ILLINOIS 60602 312/793-6200

REGIONAL OFFICE: 3 WEST OLD STATE CAPITOL PLAZA, MYERS BUILDING, 2ND FLOOR SPRINGFIELD, ILLINOIS 62701 217/782-1927

March 19, 1980

Howard L. Mocerf
Borovsky, Ehrlich & Kronenberg
120 S. LaSalle Street
Suite 1820
Chicago, Illinois 60603

Re: Laverne L. Logan v. Zimmerman Brush Co.
Charge No. 1980CN0680

Dear Mr. Mocerf:

In order for the Commission to promptly complete the investigation and make a determination on the aboved captioned charge it will be necessary to interview, Mr. Weber, Superintendent and Flo, the 4th floor Supervisor.

During the week of March 24, 1979 I will be available to conduct an on site interview with these individuals.

A recommendation on this charge will be submitted to the Commission no later than March 31, 1979, therefore if you fail to cooperate with this request it could result in a finding of Substantial Evidence.

Finally although the Fact-Finding Conference was not convened within 120 days, the Commission has jurisdiction to investigate the charge and issue an order within 180 days.

Very truly yours,

/s/_____

DOLORES NEIGHBORS
*Investigator*
*Investigation Division*
*793-6272*

DN:drn

## IN THE SUPREME COURT OF ILLINOIS

ZIMMERMAN BRUSH COMPANY,
AN ILLINOIS CORPORATION, PETITIONER,

*v.*

THE ILLINOIS FAIR EMPLOYMENT PRACTICES COMMISSION, A STATE AGENCY; DOLORES NEIGHBORS, IN HER CAPACITY AS INVESTIGATOR OF SAID COMMISSION; CONNIE VILLALBA, IN HER CAPACITY AS UNIT COORDINATOR OF SAID COMMISSION; AND LAVERNE L. LOGAN, COMPLAINANT BEFORE SAID COMMISSION, RESPONDENTS.

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### PETITION FOR WRIT OF PROHIBITION

To the Honorable Justices of the Supreme Court of Illinois:

Your Petitioner, ZIMMERMAN BRUSH COMPANY, by its attorneys, BOROVSKY, EHRLICH & KRONENBERG, respectfully represents to this Honorable Court as follows:

1. That Petitioner is, and at all times hereinafter mentioned was, a corporation of the State of Illinois created and existing under Illinois Revised Statutes, Chapter 144, Section 1001 *et seq.*

2. That Respondent, Illinois Fair Employment Practices Commission (hereinafter the "FEPC" or "Commission") is, and at all times hereinafter mentioned was, a State administrative agency, created and existing under Illinois Revised Statutes, Chapter 48, Section 851, *et seq.*; and was, and is, charged with the duties and vested with the powers therein specified.

3. That Respondent, Dolores Neighbors, is, and at all times hereinafter mentioned was, the Investigator assigned by Respondent FEPC to conduct a fact finding conference in the matter of Laverne L. Logan and Zimmerman Brush Company, FEPC Charge Number 1980 CN 0680.

4. That Respondent, Connie Villalba, is, and at all times hereinafter mentioned was, the Unit Coordinator assigned

by Respondent FEPC to supervise the processing by the FEPC of the matter of Laverne L. Logan and Zimmerman Brush Company, FEPC Charge Number 1980 CN 0680.

5. That Respondent, Laverne L. Logan, is, and at all times hereinafter mentioned was, the Complainant in the matter of Laverne L. Logan and Zimmerman Brush Company, FEPC Charge Number 1980 CN 0680.

6. That Respondent, Laverne L. Logan, filed a charge of unfair employment practice with Respondent FEPC on November 14, 1979. This charge was designated by the FEPC as Charge Number 1980 CN 0680. A copy of said charge is attached hereto as Exhibit A and by this reference is made a part hereof.

7. That with the filing of the aforesaid charge of unfair employment practice by Respondent Laverne L. Logan on November 14, 1979, the statutory time period within which the FEPC must convene a fact finding conference commenced to run.

8. That a fact finding conference with respect to the aforementioned charge was scheduled by the FEPC to convene on March 18, 1980, a period in excess of 120 days from the filing of the charge. A copy of the Notice of Fact Finding Conference is attached hereto as Exhibit B and by this reference is incorporated as a part hereof.

9. That Section 8(b) of the Fair Employment Practices Act (hereinafter the "Act"), 48 S.H.A. §858(b), unequivocally states that the FEPC "shall" convene a fact finding conference within 120 days of the proper filing of a charge.

10. That on March 18, 1980, Petitioner, by one of its attorneys, Thomas R. Palmer, appeared at the time and place scheduled by the FEPC for the convening of the fact finding conference for the limited purpose of presenting Petitioner's motion to the FEPC to dismiss the unfair employment charge of Laverne L. Logan, asserting as grounds thereof that the FEPC lacked statutory authority to convene an untimely fact finding conference and jurisdiction to further proceed in the matter. A copy of said motion is attached hereto as Exhibit C and by this reference is made a part hereof.

11. That on March 18, 1980, Respondent FEPC, by its duly appointed and acting agents, Dolores Neighbors, Investigator, and Connie Villalba, Unit Coordinator, denied Petitioner's motion to dismiss the aforementioned charge.

12. That Respondent FEPC, despite the specific requests of one of Petititioner's attorneys, Thomas R. Palmer, has refused to set forth in writing the legal basis of its ruling denying Petitioner's motion to dismiss the aforementioned charge, but instead, has orally advised Petitioner that the FEPC is not required to conduct a fact finding conference and that in spite of its failure to timely convene such a conference, the Commission may still proceed to a determination in the matter within the 180-day period following the filing of the aforementioned charge. The affidavit of Thomas R. Palmer is attached hereto as Exhibit D and by this reference is made part hereof.

13. That the Respondent FEPC did continue, has continued and will continue to assert jurisdiction with respect to Respondent Laverne L. Logan's charge in that:

(a) On March 18, 1980, subsequent to its denial of Petitioner's motion to dismiss the aforementioned charge, Respondent FEPC met and conferred with Respondent Laverne L. Logan to solicit further information and opinions relevant to its evaluation of the merits of the charge and its issuance of a determination in the matter;

(b) On March 18, 1980, Respondent FEPC, by its duly appointed and acting agent, Dolores Neighbors, orally advised Petitioner that written requests for more information relevant to the FEPC's further processing of the charge and a request for the scheduling of a meeting with each of the two agents of Petitioner named in Respondent Laverne L. Logan's charge would be directed by the FEPC to the Petitioner and that the Petitioner's failure to satisfactorily respond to any of these requests would result in a finding by the FEPC of "substantial evidence" that an unfair employment practice had been committed by Petitioner due to Petitioner's failure to cooperate with the investigation of the charge;

(c) On March 18, 1980, Respondent FEPC, by its duly appointed and acting agent, Dolores Neighbors, further orally advised Petitioner that, subsequent to a finding by the FEPC of "substantial evidence" of the commission of an unfair employment practice for failure of Petitioner to cooperate, a complaint by the FEPC would issue against Petitioner followed by the scheduling of a conciliation conference, and that the Petitioner's failure to participate in such a conference would result in the matter being set for a full public hearing. See Exhibit D. The failure of the Petitioner to answer the FEPC's formal complaint or further participate in such public hearing would result in the entry of an order by the FEPC against Petitioner and in favor of Laverne L. Logan. The Act, §8.01(b).

14. That Respondent FEPC, and the members thereof, by themselves or through Respondents Dolores Neighbors or Connie Villalba, are without jurisdiction to proceed to a public hearing in this matter or in any way to further process the aforementioned charge for the reason that a fact finding conference was not convened within 120 days of the proper filing of the charge as mandated by Section 8(b) of the Fair Employment Practices Act, and the directives of both the Illinois General Assembly and this Honorable Court in its decisions in *Board of Governors v. Illinois Fair Employment Practices Commission*, 78 Ill. 2d. 143 (1979) and *Springfield-Sangamon County Regional Planning Commission v. Fair Employment Practices Commission*, 71 Ill. 2d. 61 (1978).

15. That Respondents FEPC, Dolores Neighbors and Connie Villalba's unlawful assertion of jurisdiction in this matter trends to bring into disrepute FEPC administrative proceedings and justice in this State. By unlawfully asserting jurisdiction, Respondents are acting in wilful disregard of the unequivocal mandate of Section 8(b) of the Fair Employment Practices Act which states that the FEPC "shall" convene a fact finding conference within 120 days of the filing of a charge and the clear directive stated by this Honorable Court in *Board of Governors* and *Springfield-Sangamon County*. These cases hold that such language

imposes a compulsory duty on the FEPC to act within the specified time and that, unless "waived" by the parties to the charge, the failure of the FEPC to act within the prescribed period deprives the Commission of jurisdiction over the matter.

16. That Petitioner did not and has not "waived" the statutory requirement that Respondent FEPC convene a fact finding conference within 120 days of the proper filing of a charge.

17. That the continued unlawful assertion of jurisdiction by Respondent FEPC with respect to FEPC Charge Number 1980 CN 0680 will cause irreparable harm and loss to Petitioner. The FEPC's decision to continue to assert jurisdiction over the Charge deprives the Petitioner of its procedural and substantive rights, and will cost the Petitioner substantial and incalculable unrecoverable costs. Thus, since the FEPC intends to proceed and is proceeding without the participation of the Petitioner, the FEPC will enter an order in favor of Respondent Logan for back pay and reinstatement. If the Petitioner participates in the FEPC proceedings, it will not only "waive" its right to object to the FEPC's assertion of jurisdiction but will also be required to divert substantial time and attention of its management personnel from operational responsibilities in order to respond to the FEPC's further investigation and, perhaps, to prepare for and attend a public hearing. Additionally, if the Petitioner participates further in the matter, it would be required to incur costs and attorney's fees which cannot be recovered from any of the Respondents.

18. That Petitioner has no adequate remedy in the premises of this matter, except by writ of prohibition issued by this Honorable Court, to prevent said FEPC from continuing to exercise jurisdiction or apparent jurisdiction in said matter.

19. That no contested question of fact is raised by the Petitioner.

WHEREFORE, your Petitioner prays that an order or rule be entered by this Honorable Court directing Respondents Fair Employment Practices Commission,

Dolores Neighbors and Connie Villalba to make answer to this Petition within a time fixed by this Honorable Court, showing cause, if any, why a writ of prohibition should not issue against them prohibiting them from assuming and exercising any further jurisdiction, whatever, in the matter of Laverne L. Logan and Zimmerman Brush Company, FEPC Charge Number 1980 CN 0680, and that upon a hearing thereon, a writ of prohibition issue commanding and directing said Commission, and Respondents Dolores Neighbors and Connie Villalba, to refrain and desist from any further assertion of jurisdiction whatever in this matter.

By:_____
HOWARD L. MOCERF

By:_____
THOMAS R. PALMER

*Attorneys for Petitioner*
*Zimmerman Brush Company*

*Dated:*

BOROVSKY, EHRLICH & KRONENBERG
*120 South LaSalle Street*
*Suite 1820*
*Chicago, Illinois 60603*
*(312) 558-1500*

YALE ZIMMERMAN affirms that he is the Vice President of Petitioner in the foregoing Petition; that he has read said Petition and has knowledge of the contents thereof and that the matters set out therein are true in substance and in fact.

_____
YALE ZIMMERMAN
*Vice President*
*Zimmerman Brush Company*

State of Illinois
County of Cook

On March 20, 1980, before me, the undersigned, a Notary Public in and for said State, personally appeared Yale

Zimmerman known to me to be the person whose name is subscribed to the within instrument and acknowledged that Yale Zimmerman executed and affirmed same.

Witness my hand and official seal:

_____

NOTARY PUBLIC

**(Certificate of service omitted in printing.)**

STATE OF ILLINOIS
OFFICE OF

CLERK OF THE SUPREME COURT
SPRINGFIELD
62706

March 25, 1980

Mr. Howard L. Mocerf
Borovsky, Ehrlich & Kronenberg
Attorneys at Law
120 S. LaSalle Street
Suite 1820
Chicago, IL 60603

In re: Zimmerman Brush Company, etc., petitioner, vs. The Illinois Fair Employment Practices Commission, a State Agency; et al., etc., respondents. No. 53199

Dear Mr. Mocerf:

We are enclosing a copy of the order entered today by the Supreme Court concerning the above entitled cause.

The summons has today issued.

Very Truly yours,

/s/_____
Clerk of the Supreme Court

CLW:jae
cc: Stuart Garbutt
Russell Grimes
Laverne L. Logan

March 25, 1980

No. 53199

Zimmerman Brush Company, an Illinois Corporation, petitioner, vs. The Illinois Fair Employment Practices Commission, a State Agency; et al., etc., respondents.

The motion by petitioner for leave to file a petition for an original writ of prohibition and for stay of proceedings is

allowed. Further proceedings in Charge Number 1980 CN 0680 are stayed pending disposition of this cause. Summons to issue. Respondents are ordered to file a response to said petition on or before April 4, 1980. Brief of petitioner to be filed on or before April 25, 1980; brief of respondents to be filed on or before May 16, 1980, and reply brief of petitioner, if any, to be filed on or before May 26, 1980. Cause to be heard at the May 1980 Term.

around like the rest of the employees when the line was full.

Mr. Laverne L. Logan, on oath or affirmation states that he is the complainant herein, that he has read the foregoing charge and knows the contents thereof, and that the same are true and correct to the best of his knowledge.

/s/ _____
SIGNATURE OF COMPLAINANT

Subscribed and sworn to before me this 10 day of May 1980
Chicago, Illinois

/s/_____
Notary Public

**OPINION**
**SUPREME COURT**
**OF ILLINOIS**
**United States of America**

State of Illinois } SS.
Supreme Court }

At a Term of the Supreme Court, begun and held in Springfield, on Monday, the eighth day of September in the year of our Lord, one thousand nine hundred and eighty, within and for the State of Illinois.

PRESENT: JOSEPH H. GOLDENHERSH,
CHIEF JUSTICE

JUSTICE ROBERT C. UNDERWOOD
JUSTICE HOWARD C. RYAN
JUSTICE THOMAS J. MORAN

TYRONE C. FAHNER ATTORNEY GENERAL
LOUIE F. DEAN, MARSHAL
ATTEST: CLELL L. WOODS, CLERK

JUSTICE DANIEL P. WARD
JUSTICE WILLIAM G. CLARK
JUSTICE THOMAS E. KLUCZYNSKI

Be It Remembered, that afterwards, to-wit, on the 29th day of September, 1980 the opinion of the Court was filed in said cause and entered of record in the words and figures following, to-wit:

| | |
|---|---|
| Zimmerman Brush Company, an Illinois corporation, Petitioner<br>No. 53199 vs.<br>The Illinois Fair Employment Practices Commission, a State Agency; et al., etc., Respondents | Prohibition |

**Docket No. 53199—Agenda 49—May 1980.**

ZIMMERMAN BRUSH COMPANY, Petitioner, v. THE ILLINOIS FAIR EMPLOYMENT PRACTICES COMMISSION, Respondent.

MR. JUSTICE WARD delivered the opinion of the court:

On November 9, 1979, Laverne Logan was discharged from his employment at the Zimmerman Brush Company (company) in Chicago, on the ground that he was unable to perform his duties on an assembly line due to a physically handicapped left leg. On November 14, Logan filed a charge with the Illinois Fair Employment Practices Commission (Commission) claiming that he had been discriminated against because of his handicap. On January 30, 1980, the company was notified by the Commission to be present at a fact-finding conference set for March 18, 1980, in order to "define the issues, determine which facts are undisputed, obtain evidence, and ascertain whether there is a basis for a negotiated settlement of the charge." The company was also asked to complete a two-page questionnaire regarding the circumstances of Logan's discharge. The company answered the questionnaire and returned it on March 7.

On March 18 the company appeared for the sole purpose of moving to dismiss the charge on the ground that the conference was convened 125 days after Logan's charge was filed, which was beyond the 120-day period provided for in the Fair Employment Practices Act (Ill. Rev. Stat. 1979, ch. 48, par. 858(b). Since the meeting was not held within the prescribed period, the company said the Commission lost jurisdiction and should dismiss the charge. Upon the oral denial of the motion and the hearing officer's statement that the conference was to proceed, the company refused to participate and left the meeting.

On March 20 the company moved in this court for leave to file a petition for writ of prohibition under Supreme Court Rule 381(a) (73 Ill. 2d R. 381(a)). On March 25 the motion was allowed, briefs were ordered, the proceeding before the Commission was stayed, and oral argument on whether the writ should be allowed was set for June 25. On

April 30, Logan filed a second charge with the FEPC which was identical to the first. The Commission notified the company of its intention to proceed with the second charge and the company moved to stay the second proceeding pending a decision on its petition for a writ of prohibition. We allowed the motion to stay.

The controversy here concerns the interpretation to be given section 8(b) of the Fair Empoyment Practices Act, which provides:

> "(b) Within 120 days of the proper filing of a charge, the Commission shall convene a fact finding conference (unless the charge has been withdrawn or dismissed) for the purposes of obtaining evidence, identifying issues in dispute, ascertaining the positions of the parties, and exploring the possibility of a negotiated settlement of the controversy. Notice of such conference shall be given to all parties at least 10 days prior thereto and a default order may be entered against any party who fails to attend such conference without good cause shown." Ill. Rev. Stat. 1979, ch. 48, par. 858(b).

The company contends that the legislature, in providing that the Commission "shall convene" a fact-finding conference within 120 days after a charge has been filed with the Commission, intended to make mandatory the convening of a fact-finding conference within this prescribed time period. It contends further that a failure by the Commission to do so would result in an automatic dismissal of the charge. The Commission's position is that the provision in section 8(b) for convening a conference is only directory and that one may be called beyond the 120-day period. The complainant Logan states that, even if "shall convene" is deemed here to be mandatory, the automatic dismissal of his charge should not be the consequence of the Commission's failure to convene the conference within the prescribed statutory period.

The use of "shall" in a statutory provision does not of itself require that the provision be held to be mandatory rather than directory. One must consider the word within the context of the entire statute, looking particularly to the

purpose of the legislation. (See *Miller v. Department of Registration & Education* (1979), 75 Ill. 2d 76, 81; *In re Armour* (1974), 59 Ill. 2d 102, 104; *Carrigan v. Illinois Liquor Control Com.* (1960), 19 Ill. 2d 230,233.) Applying this principle we judge that the legislative direction to convene a fact-finding conference within the 120-day period is a mandatory one.

Section 8(b) was approved and became effective in September of 1978 shortly after this court interpreted the existing section 8(c), which required that the FEPC decide whether or not a complaint "shall" issue within 180 days after receipt of an employee's charge. In *Springfield-Sangamon County Regional Plan Com. v. Fair Employment Practices Com.* (1978), 71 Ill. 2d 61, this court analogized the 180-day period to a period of a statute of limitations and also noted the financial impact upon an employer who might be confronted by a complaint long after the alleged unfair employment practice. The court went on to hold that "the 180-day period prescribed in the statute was intended to ensure expeditious action on behalf of the FEPC, and must be considered mandatory." (71 Ill. 2d 61, 68.) It was also observed: "The respondents have the right to expect that the impact of such administrative orders will be minimized by compliance with the statutory time limitations." (71 Ill. 2d 61, 73.) Shortly thereafter in *Board of Governors v. Illinois Fair Employment Practices Com.* (1979), 78 Ill. 2d 143, 149, the decision in *Springfield-Sangamon* was upheld as being "clear and unequivocal," and this court issued a writ of prohibition against the Commission, which had filed a complaint more than two years after the expiration of the 180-day statutory period.

As stated, section 8(b), requiring that "the Commission shall convene a fact finding conference" within 120 days after receiving an unfair employment practices charge, was added to the Act by amendment eight months after the decision in *Springfield-Sangamon*. We consider that the legislature's use again of the term "shall" in section 8(b) indicates an intention that the prescription of a 120-day period be given a mandatory construction. This court has stated that where "previously construed terms in the unamended

sections are used in the amendment, it is generally concluded that the legislature intended to adopt the prior construction given to these terms." (*Hupp v. Gray* (1978), 73 Ill. 2d 78, 86, citing 1A Sutherland, Statutes and Statutory Construction sec. 22.35 (4th ed. 1972).) Though the question here is not identical, the principle of construction is applicable especially where, as here, the term previously construed appears in a later amendment to the same section of the statute. It is a canon of construction that the General Assembly is presumed to know how the courts have interpreted a particular statute and to have acted thoroughly and conscientiously. (See. *e.g.*, *People v. Manning* (1979), 76 Ill. 2d 235, 241. See also 2A Sutherland, Statutes and Statutory Construction sec. 57.05 (4th ed. 1973).) It is reasonable to consider that under these circumstances the legislature intended to adopt the prior construction of "shall."

The Commission would have us hold that the legislative pronouncement is but directory. It argues that the financial impact upon the employer in *Springfield-Sangamon*, when confronted with the prospect of being liable for back pay and interest over an extended period of time, was far greater than whatever impact there might have been here by a delay of five days in scheduling a conference.

We deem that this contention that the conference should be allowed to proceed beyond the 120-day period interprets *Springfield-Sangamon* too narrowly and ignores the goals underlying section 8(b). The fact-finding conference is specifically designed "for the purposes of obtaining evidence, identifying issues in dispute, ascertaining the positions of the parties, and exploring the possibility of a negotiated settlement of the controversy." (Ill. Rev. Stat. 1979, ch. 48, par. 858(b).) Before the provision was added to the Act in 1978 there was no formal opportunity for expeditiously resolving a dispute. The only indication of whether it was deemed that the employee's charge was supported by "substantial evidence" (Ill. Rev. Stat. 1979, ch. 48, par. 858(c)) would be on or before the 180th day after the filing of the charge when the Commission's decision to issue a complaint against the employer or not to issue a complaint was announced.

Under section 8(b) the interests of both employee and employer can be served in that each is given an opportunity to discuss and possibly settle the dispute without formal action being taken against the employer by the Commission. Through a conference, unnecessary costs may be avoided and the Commission permitted to devote itself to other matters. Even if a settlement is not reached at this stage, the proceeding can be importantly valuable to the Commission in that the conference not only places the Commission in a better posture to decide whether to dismiss the employee's charge, it also aids the Commission in setting up a procedural framework for the conciliatory process which follows. (See Ill. Rev. Stat. 1979, ch. 48, par. 858(c).) The public interest in an expeditious resolution of disputes which is made possible though section 8(b) is not less important than the financial considerations discussed in *Springfield-Sangamon.* Avoiding unnecessary expenditures of time and money by all parties serves to further the stated policy of the act, which is not only to protect employees from unfair employment practices but also to protect "employers, labor organizations and employment agencies from unfounded charges of discrimination." Ill. Rev. Stat. 1979, ch. 48, par. 851.

That a default order may be entered against a party failing to attend the conference not only illustrates the importance the legislature attached to this stage of the proceedings but also it supports our view that the provision for the convening of a conference within 120 days is a mandatory one. In *Tuthill v. Rendelman* (1944), 387 Ill. 321, 350, the court cited *Clark v. Quick* (1941), 377 Ill. 424, 430, where it was said: "Where terms of the statutes are peremptory and exclusive, where no discretion is reposed or where penalties are provided for its violation, the provisions of the act must be regarded as mandatory."

We cannot adopt the employee's contention that the Commission's failure to convene a fact-finding conference should not result in the automatic dismissal of the action and that the Commission should be allowed to proceed without a conference having been held. To adopt this posi-

tion would frustrate the purpose of attempting to facilitate just and expeditious resolutions of employment disputes. The fact-finding conference was clearly intended to be an integral and mandatory phase of the complaint process. Such conferences benefit the Commission, the employee and employer, and, of course, the public interest. Without a required fact-finding conference the Commission would in most instances have to proceed solely on the basis of the employee's charge. Unless the Commission would be able to obtain information regarding the charge from some independent investigation its decision of whether or not to file a complaint would hardly be an informed one.

The Commission and Logan also contend that the company waived its right to object to the Commission's decision to proceed with the conference on the 125th day and also is estopped from claiming that the Commission has lost jurisdiction over the dispute. The contention is founded upon the company's response to the Commission's questionnaire regarding the circumstances of the employee's discharge. The questionnaire was filed with the Commission on March 7, six days before the 120-day period had expired and 11 days before the date on which the conference was actually convened on March 18.

The contention must be denied. The company simply complied with the Commission's direction or request in completing the questionnaire. Had it not done so, as the company points out, it would have been responsible for delaying the proceeding. Too, it is not shown that the company was aware that the 120-day period under section 8(b) would expire before the scheduled date of the conference. We do not find a basis for estoppel or waiver. See generally *Pantle v. Industrial Com.* (1975), 61 Ill. 2d 365; *Levin v. Civil Service Com.* (1972), 52 Ill. 2d 516; *Lowenberg v. Booth* (1928), 330 Ill. 548; *Town & Country Bank v. James M. Canfield Contracting Co.* (1977), 55 Ill. App. 3d 91.

We also are not persuaded by the employee's protests that his rights to due process and equal protection were violated. The statutory scheme here was to provide, through administrative and judicial channels, a means of relief from discriminatroy employment practices. The legislature could

establish reasonable procedures to be followed upon a charge, and the observance of them here did not violate his constitutional rights.

The employee makes two other arguments. He says that the question regarding his charge against the company has been mooted because he filed a second and identical charge against the company before the 180-day statutory period within which a charge must be filed had expired. This, he argues, allows the Commission to proceed as if the first charge had never been filed. He further contends that the second charge is governed by the Illinois Human Rights Act, which became effective on July 1, 1980. (Ill. Rev. Stat., 1979 Supp., ch. 68, par. 1–101 *et seq.*). Logan directs attention to section 7–102(C)(3), which he says makes the convening of a fact-finding conference discretionary with the Commission. That section provides:

> "Upon reasonable notice to the complainant and the respondent, the Department may conduct a fact-finding conference. The fact-finding conference shall be held within 120 days of the date on which a charge has been filed unless waived by the parties in writing 10 days before the 120 day period has expired." Ill. Rev. Stat., 1979 Supp., ch. 68, par. 7–102(C)(3).

The argument ignores the principle that a statute will be given prospective application unless there is a clear expression of legislative intent that it is to be retroactively applied. (See, *e.g.*, *People ex rel. American Federation of State, County & Municipal Employees v. Walker* (1975), 61 Ill. 2d 112; *Vendo Co. v. Stoner* (1974), 58 Ill. 2d 289, *cert. denied* (1975), 420 U.S. 975, 43 L. Ed. 2d 655, 95 S. Ct. 1398; *Country Mutual Insurance Co. v. Knight* (1968), 40 Ill. 2d 423.) It is evident there is nothing in the above-quoted section to require or permit retroactive application.

Too, this controversy was not made moot by the employer's filing a second charge with the Commission. As the complainant interprets the Act, as long as the 180 days within which he may file a charge with the Commission under section 8(a) have not expired, he is entitled to file another charge. To be consistent, it would seem he would have to contend that this would be so regardless of the fact

that the Commission had dismissed an earlier charge or, as in this case, had failed to convene a fact-finding conference within 120 days, which resulted in the dismissal of the charge. To allow such interpretation, however, obviously would frustrate the design of sections 8(a) and 8(b) and, in a case such as this one, would allow the Commission, despite its failure to comply within the Act, to proceed on an identical charge after the first charge had already expired or suffered dismissal. Not only would an employer's rights be prejudiced if an employee were allowed to file a second and successive charge, but also the public interest in promoting an expeditious resolution of charges would be circumvented.

For the reasons given, the petition for writ of prohibition is allowed.

*Writ awarded.*

## FAIR EMPLOYMENT PRACTICES ACT

AN ACT to promote the public health, welfare and safety of the People of the State of Illinois by reducing denial of equality of employment opportunity.

851. Declaraton of policy

Whereas denial of equal employment opportunity because of race, color, religion, sex, national origin, ancestry, physical or mental handicap unrelated to ability, or unfavorable discharge from military service, with consequent failure to utilize the productive capacities of individuals to the fullest extent deprives a portion of the population of the State of earnings necessary to maintain a reasonable standard of living, thereby tending to cause resort to public charity and may cause conflicts and controversies resulting in grave injury to the public safety, health and welfare:

Therefore, it is declared to be the public policy of this State that without in any way precluding any employer from selecting between persons of equal merit, ability, and capabilities, equal employment opportunity or apprenticeship opportunity without discrimination because of race, color, religion, sex, national origin, ancestry, physical or mental handicap unrelated to ability, or unfavorable discharge from military service should be protected by State law.

It is also the public policy of this State to protect employers, labor organizations and employment agencies from unfounded charges of discrimination.

852. Definitions

Definitions. When used in this Act, unless the context otherwise requires, the term:

(a) "Commission" the Fair Employment Practices Commission created by this Act.

(b) "Complainant" means any individual charging on his own behalf to have been personally aggrieved by an unfair employment practice.

(c) "Employee" includes and means any individual performing services for remuneration within this State for an employer, or who is an apprentice, or who is an applicant for

any apprenticeship; except that the term "employee" does not inlcude domestic servants in private homes, those clients who are in a vocational rehabilitation facility certified pursuant to Section 14(c) of The United States Fair Labor Standards Act, as amended, in the following categories: evaluee—a person in a diagnostic program for up to 6 months; trainee—a person in a training program used to implement the findings of the diagnostic evaluation and not engaged in productive work for up to 12 months; and work activity client—a person in a therapeutic day care program for whom work is inconsequential, individuals employed by persons who are not employers as defined by this Act, or persons employed in "agricultural labor" as that term is defined in The Unemployment Compensation Act, as now or hereafter amended; nor does the term "employee" include any elected public official or the members of his immediate personal staff or the principal administrative officers of the State of Illinois or of any political subdivision, municipal corporation or other governmental unit or agency thereof.

(d) "Employer" includes and means: (i) any person (as defined in this Section) employing 15 or more persons within this State during 20 or more calendar weeks within the calendar year of or preceding an alleged unfair employment practice; (ii) the State and any political subdivision, municipal corporation or other governmental unit or agency thereof, without regard to the number of employees. The term "employer" does not include any religious corporation, association, educational institution or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution or society of its activities.

(e) "Employment Agency" includes both public and private employment agencies and any person, and any labor organization or labor union having a hiring hall or hiring office regularly undertaking, with or without compensation, to procure opportunities to work, or to procure, recruit, refer or place employees.

(f) "Labor Organization" includes any organization, or labor union, craft union, or any voluntary unincorporated as-

sociation designed to further the cause of the rights of union labor which is constituted for the purpose, in whole or in part, of collective bargaining or of dealing with employers concerning grievances, terms, or conditions of employment, or apprenticeships or applications for apprenticeships, or of other mutual aid or protection in connection with employment, including apprenticeships or applications for apprenticeships.

(g) "Person" includes one or more individuals, partnerships, associations or organizations, labor organizations, labor unions, or union labor associations, corporations, legal representatives, trustees in bankruptcy or receivers.

(h) "Unfair Employment Practices" includes only those practices specified in Section 3 of this Act.

(i) "Unfavorable Discharge" includes discharges from the Armed Forces of the United States, their Reserve components or any National Guard or Naval Militia which are classified as RE–3 or the equivalent thereof, but does not include those characterized as RE–4 or "Dishonorable".

853. Unfair employment practices.

Unfair employment practices. It is an unfair employment practice:

(a) For any employer, because of race, color, religion, sex, national origin, ancestry or physical or mental handicap unrelated to ability of an individual, or an unfavorable discharge from military service, to refuse to hire, to segregate, or otherwise to discriminate against such individual with respect to hire, selection and training for apprenticeship in any trade or craft, tenure, terms or conditions of employment; or

(b) For any employment agency to fail or refuse to classify properly, accept applications and register for employment referral or apprenticeship referral, refer for employment, refer for apprenticeship, or otherwise to discriminate against any individual because of his race, color, religion, sex, national origin, ancestry, physical or mental handicap unrelated to ability, or unfavorable discharge from military service, or to accept from any person any job order, requisition or request for referral of applicants for employment or

apprenticeship which makes, or has the effect of making, race, color, religion, sex, national origin, ancestry or physical or mental handicap unrelated to ability a condition of referral, except for a bona fide occupational qualification; or

(c) For any labor organization because of the race, color, religion, sex, national origin, ancestry, physical or mental handicap unrelated to ability, or unfavorable discharge from military service, military service, of any person to discriminate against such person, or to limit, segregate or classify its membership with respect to such person, or to limit such person's employment opportunities, such person's selection and training for apprenticeship in any trade or craft, or otherwise to take, or fail to take, any action which affects adversely such person's status as an employee or as an applicant for employment or as an apprentice, or as an applicant for apprenticeships, or such person's wages, tenure, hours of employment or apprenticeships conditions; or

(d) For any employer, employment agency or labor organization to discriminate against any person because he or she, reasonably and in good faith, has opposed any practice forbidden in this Act, or because he or she, reasonably and in good faith, has made a charge, testified or assisted in any investigation, proceeding or hearing under this Act; or

(e) For any employer, employment agency or labor organization to inquire on a written application whether a job applicant has ever been arrested; or

(f) For any person to compel or coerce any person to engage in any of the acts declared by this Act to be unfair employment practices.

Nothing in this Act shall preclude an employer from hiring or selecting between persons for (1) any reason except for the unfair employment practices specifically prohibited by this Act, (2) a bona fide occupational qualification or (3) "dishonorable" discharge from military service.

Nothing in this Act shall preclude the giving of preferential treatment to veterans by employers, employment agencies, labor organizations or other persons as required by law or regulation of the United States or of the State of Illinois.

Notwithstanding those provisions of paragraphs (a), (b), and (c) relating to unfavorable discharge from military service, those provisions do not apply to financial institutions where the requirements of a Federal Law or a regulation of the Federal Government or an agency thereof applicable to such institution is inconsistent; nor do those provisions apply to positions of employment in which fiduciary responsibilities are exercised. The commission shall adopt regulations defining positions in which fiduciary responsibilities are exercised.

Nor shall anything in this Act preclude any employer from giving or acting upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended, or used to discriminate because of race, color, religion, sex, national origin, ancestry, physical or mental handicap unrelated to ability, or discharge from military service.

854. Public contracts

Public contracts. Every contract to which the State, any of its political subdivisions or any municipal corporation is a party shall be conditioned upon the requirement that the supplier of materials or services or the contractor and his subcontractors, and all labor organizations furnishing skilled, unskilled, and craft union skilled labor, or who may perform any such labor or services, as the case may be, shall not commit an unfair employment practice in this State as defined in this Act, and shall take affirmative action to insure that no unfair employment practice is committed. To the full extent to which the State may have authority with respect to such contracts, this Section shall be applicable.

854A. Rules and regulations.

Rules and regulations. The Commission shall have the authority to issue rules and regulations, conduct investigations, hold hearings and issue orders based thereon for the purposes of enforcement and administration of Section 4 of this Act and rules and regulations adopted thereunder. All rules and regulations adopted under this Section shall be consistent with Section 4.

No contract shall be awarded by the State to any employer found by the Commission to have violated its rules and regulations until the Commission shall certify that the violation has ceased. For each violation that occurs there may be deducted from the amount payable to the contractor by the State of Illinois a penalty of $5 for each calendar day that the violation persists. Further, the State, any of its political subdivisions or any municipal corporation may avoid any such contract at its option and it may sue and shall recover the profits earned on such contract.

855. Illinois Fair Employment Practices Commission

Illinois Fair Employment Practices Commission. (a) The Fair Employment Practices Commission is created, to consist of 5 members, all of whom shall be bona fide residents of Illinois for 5 years last past, appointed by the Governor with the advice and consent of the Senate, no more than 3 of whom shall be of the same political party and one of whom shall be designated by the Governor as Chairperson. If the Senate is not in session at the time this Act takes effect, the Governor shall make temporary appointments as in the case of a vacancy with the advice and consent of an interim committee composed of 3 members of the Senate appointed by the President thereof and 3 members of the House of Representatives appointed by the Speaker thereof. Appointments to the committee shall be made during the month of June of each odd numbered year. Members shall serve until July 1 of the succeeding odd numbered year and until their successors are appointed and qualified or until termination of their legislative service whichever first occurs. Vacancies shall be filed for the unexpired term in the same manner as original appointments. All appointments shall be in writing and filed with the Secretary of State as a public record.

(b) Of the commission members first appointed, 2 shall be appointed for a term of 2 years each, and 3 (including the chairperson) shall be appointed for a term of 4 years each, commencing the 3rd Monday in January, 1961. Thereafter, each member shall serve for a term of 4 years and until his successor is appointed and qualified; except that any mem-

ber chosen to fill a vacancy occurring otherwise than by expiration of the term shall be appointed only for the unexpired term of the member whom he shall succeed and until his successor is appointed and qualified. In the event of a vacancy in office during the recess of the Senate, the Governor shall make a temporary appointment until the next meeting of the Senate. Such temporary appointment is subject to the advice and consent of the interim committee provided for in this Section.

(c) A single vacancy in the Commission shall not impair the right of the remaining members to exercise all the powers of the Commission. A majority of the members of the Commission then in office shall constitute a quorum.

(d) The Chairperson of the Commission shall be compensated at the rate of $10,000 per year until July 1, 1979; $11,000 from July 1, 1979 to July 1, 1980; $11,700 from July 1, 1980 to July 1, 1981, and $12,500 per year thereafter during his service as Chairperson, and each other member shall be compensated at the rate of $7,500 per year until July 1, 1979; $8,200 from July 1, 1979 to July 1, 1980; $8,700 from July 1, 1980 to July 1, 1981; $9,300 from July 1, 1981 to July 1, 1982, and $10,000 per year thereafter. In addition, all members of the Commission shall be reimbursed for expenses actually and necessarily incurred by them in the performance of their duties.

856. Powers and duties of the Commission

Powers and duties of the Commission. In addition to other powers and duties prescribed in this Act, the Commission shall have the powers and duties enumerated in Sections 6.01 through 6.08.

856.01. Meetings and functions

To meet and function at any place within the State.

856.02. Offices

To establish and maintain offices in Springfield and Chicago.

856.03. Executive director, technical advisors and employees.

To select and fix the compensation of an executive director, technical advisors and such other employees as it may deem necessary.

856.04. Hearing examiners

To select and fix the compensation of Hearing Examiners, who shall be attorneys duly licensed to practice law in this State.

856.05 Rules and regulations

To adopt, promulgate, amend and rescind rules and regulations not inconsistent with the provisions of this Act.

856.06. Posting of notices

To adopt, promulgate, amend and rescind regulations of general and uniform applicability, requiring the posting of notices by employers, employment agencies and labor organizations, apprising persons of their rights under the Act and of the coverage of such employers, employment agencies and labor organizations by the Act.

856.07. Charges—Receiving and investigation

To issue, receive, investigate and determine charges filed with it in conformity with this Act.

856.08. Reports

To report to the Governor and the General Assembly at the beginning of each General Assembly and upon request.

857. Educational program

Educational program. For the purpose of promoting equal employment opportunity, regardless of race, color, religion, sex, national origin, ancestry or physical or mental handicap unrelated to ability, and to create and to maintain better community understanding, the Commission may issue such publications, conduct such research, and make such surveys as in the judgment of the Commission will tend to promote equality of employment opportunity, including apprenticeship, regardless of race, color, religion, sex, national origin, ancestry or physical or mental handicap unrelated to ability.

858. Procedure—Charge, investigation, conference, settlement and adjustment

Procedure—Charge, investigation, conference, settlement and adjustment. (a) Whenever within 180 days after the date that an unfair employment practice allegedly has been committed, a charge in writing under oath or affirmation is filed with the Commission by a complainant or by the Commission upon a vote of at least 3 members and in such detail as to substantially apprise any party properly concerned as to the time, place and facts with respect to such alleged unfair employment practice, that any employer, labor organization, employment agency, or person, hereinafter referred to as a respondent, has committed such unfair employment practice, the Commission shall promptly serve a copy of the charge within 10 days on the respondent and thereafter shall institute an investigation by its employees to ascertain the facts relating to such alleged unfair employment practice.

(b) Within 120 days of the proper filing of a charge, the Commission shall convene a fact finding conference (unless the charge has been withdrawn or dismissed) for the purposes of obtaining evidence, identifying issues in dispute, ascertaining the positions of the parties, and exploring the possibility of a negotiated settlement of the controversy. Notice of such conference shall be given to all parties at least 10 days prior thereto and default order may be entered against any party who fails to attend such conference without good cause shown.

(c) If it is determined by the Commission, after such investigation, that there is not substantial evidence that the alleged unfair employment practice has been committed, the charge shall be dismissed; otherwise, a Commissioner or an attorney licensed to practice in Illinois, designated by the Commission, shall endeavor to eliminate the effect thereof and prevent repetition thereof by means of conference and conciliation. The complainant and respondent shall be notified of the time and place of the conference by registered or certified mail at least 10 days prior thereto and either or both parties shall appear at such conference or conciliation in person or by attorney. The place fixed shall be within 35 miles of the place where the unfair practice is alleged to have been committed. What occurs in the

conference or conciliation meeting shall not be disclosed by the Commission unless the complainant and respondent agree in writing that such disclosure be made. When a settlement is effectuated in conference and conciliation conducted by a Commissioner or attorney, the terms of settlement and adjustment shall be subject to the approval of the Commission. The Commission shall notify the complainant and the respondent of the disposition of every charge filed and the terms of any settlement, adjustment or dismissal thereof. Any member of the Commission who takes part in an investigation shall thereby be disqualified to hear any evidence on the cause in question. Except as provided in this Section, the manner and form of filing charges shall be in accordance with such rules and regulations as the Commission shall from time to time prescribe. If a settlement is effectuated, and the terms thereof are approved by the Commission, then the Commission shall prepare written terms of settlement and adjustment and have the complainant and respondent agree to them in writing. The Commission shall then enter upon all parties an order in accord with the executed written terms of settlement and adjustment. If the Commission determines after an investigation that there is substantial evidence that the respondent has violated the terms of settlement and adjustment and the order entered pursuant thereto, the Commission may either commence an action pursuant to Section 11 of this Act, or issue a written complaint and order a public hearing on such alleged violation, and, finding that such alleged violation has occured, may then order such remedies as may be necessary to correct the violation. If the Commission finds that no violation has occured it shall dismiss the complaint. If terms of settlement and adjustment not approved by the Commission are entered into by a complainant and respondent, the Commission need not enter an order in accord therewith and may terminate further proceedings in the case. The Commission may dismiss a charge if, in conference and conciliation, it is established to the satisfaction of the Commission that the respondent has taken steps to eliminate the effects of the unfair employment practice charged and pre-

vent the repetition thereof, or if, in conference and conciliation, the respondent offers and complainant declines to accept terms of settlement and adjustment which the Commission finds are sufficient to eliminate the effects of the unfair employment practice charged and prevent the repetition thereof.

(d) The Commission shall, within 180 days after the expiration of the 120 day period specified in paragraph (b), or within any extension of the 180 day period agreed to in writing by all parties and approved by a member of the Commission, either issue and serve a complaint in the manner and form set forth in Section 8.01 or shall order that no complaint be issued. Any such order shall be duly served upon both the complainant and respondent.

858.01. Procedure—Complaint, answer, hearing and order

Procedure—Complaint, answer, hearing and order. (a) In case of failure to settle or adjust any such charge by conference and conciliation in accordance with Section 8 of this Act, the Commission shall cause to be issued and served upon such respondent a written complaint, under oath or affirmation, stating the charge of unfair employment practice substantially as alleged in the charge theretofore filed with the Commission as here inbefore provided in Section 8 of this Act and the relief sought on behalf of the person aggrieved and containing a notice of public hearing before a Commissioner or a duly appointed Adjudicator at a place therein fixed, to be held not less than 30 nor more than 90 days after the service of such complaint. The place fixed shall be within 100 miles of the place where the unfair employment practice is alleged to have been committed.

(b) Any complaint may be amended under oath by leave of the Commissioner or Adjudicator conducting the public hearing, for good cause shown, upon reasonable notice to all interested parties at any time prior to the issuance of an order based thereon. A motion that the complaint be amended to conform to the evidence, made prior to the close of the public hearing, may be addressed orally on the record to the Commissioner or Adjudicator conducting the

public hearing and, if such a motion is made, it shall be granted for good and sufficient cause. The respondent shall file an answer under oath or affirmation to the original or amended complaint within 30 days of the date of service thereof, but the Commissioner or Adjudicator conducting the public hearing may, for good cause shown, grant further time for the filing of an answer. In the event that the respondent files a motion to dismiss the complaint within 30 days and the motion is denied by the Commissioner or Adjudicator conducting the public hearing, the time for filing the answer shall be within 15 days of date of denial of the motion. Any allegation in the complaint which is not denied or admitted in the answer is deemed admitted unless the respondent states in the answer that he is without sufficient knowledge or information to form a belief with respect to such allegation. The failure to file an answer is deemed to constitute an admission of the allegations contained in the complaint. The respondent has the right to amend his answer upon leave of the Commissioner or Adjudicator conducting the public hearing, for good cause shown. Both the complainant and the respondent may appear at the hearing and examine and cross-examine witnesses.

The testimony taken at the hearing shall be under oath or affirmation and a transcript thereof made and filed in the office of the Commission. The testimony taken at the hearing is subject to the same rules of evidence that apply in courts of this State in civil cases.

(c) When all the testimony has been taken, the Commissioner or Adjudicator shall determine whether the respondent has engaged in or is engaging in the unfair employment practice with respect to the person aggrieved as charged in the complaint. A determination sustaining a complaint shall be based upon a preponderance of the evidence. The Commissioner or Adjudicator than shall state his recommendations in writing and, if he finds against the respondent, shall issue and cause to be served on such respondent and the complainant a recommended order requiring such respondent to cease and desist from the unfair employment practice complained of, and to take such

further affirmative or other actions with respect to the person aggrieved, including but not limited to reinstatement of hiring, back pay, costs, and reasonable attorney fees where appropriate, as will eliminate the effect of the practice complained of. An award of back pay shall not be made for any period more than two years prior to the filing of the charge. If, upon all the evidence, the Commissioner or Adjudicator finds that a respondent charged in the complaint or that a preponderance of the evidence does not sustain the complaint, he shall state his findings of fact and shall issue and cause to be served on the respondent and the complainant a recommended order dismissing the complaint. Such a recommendation order dismissing the complaint may include an award of reasonable attorney fees in favor of the respondent if it is determined that the complaint was frivolous or unreasonable or that the complainant continued to litigate after it clearly became so.

858.01a. Actions—Injunctions—Limitation

In the case of any charge of an unfair employment practice which has been properly filed with the Commission prior to March 30, 1978, which has not been settled or adjusted by conference and conciliation under Section 8, and which within 180 days thereafter has not been the subject of a complaint issued by the Commission or an order that no complaint be issued, the person filing the charge may seek appropriate injunctive or other relief by filing an action in the circuit court of the county where the alleged unfair employment practice occurred, and if the person prevails in such action the court may award such person costs and reasonable attorneys' fees. The Commission shall notify all such persons by registered mail of their right to seek such relief and any such action must be initiated in the circuit court within 2 years of the receipt of such notice, notwithstanding any other statute of limitations imposed on such actions.

858.02. Procedure—Review by Commission, order

Procedure—Review by Commission, order. (a) The findings and recommended order of the Commissioner or Adjudicator shall be filed with the Commission.

(b) Any party to the proceedings may file written exceptions, supported by argument, to the findings and recommended order of the Adjudicator within 30 days after service of said findings and recommended order on such party. Copies thereof shall be served on all other parties at the same time. Any other party may file a written response to such exceptions and argument within 21 days thereafter, serving copies at the same time on all other parties. Any party shall be allowed oral argument before the Commission by requesting same at the time of filing its written exceptions or responses as hereinabove provided. If any party requests oral argument in this manner, the Commission shall schedule oral arguments to be heard before at least a majority of the members of the Commission, and shall notify all parties in writing of the time and place for such arguments. Any other party not previously requesting oral argument shall be permitted to present such arguments at the time and place scheduled by filing a written demand therefore with the Commission not less than 10 days prior to the date set for oral arguments.

(c) The Commission, on its own motion or pursuant to the written request of any party made at the time of filing exceptions or responses as hereinabove provided, may remand a case to an Adjudicator or Commissioner for purposes of a rehearing or for hearing additional evidence in the matter. In such event, the Commission shall issue and serve on all parties a written order remanding the cause and specifying the additional evidence which shall be taken. The Adjudicator or Commissioner presiding at such rehearing or additional evidence shall set a date therefore upon due notice to all parties. After conclusion of such rehearing or additional evidence, the Adjudicator or Commissioner shall file written findings and recommendations based thereon with the Commission, serving copies at the same time on all parties in the same manner as provided in Section 8.01(c) hereof. Such findings and recommendations shall be subject to review by the Commission as provided in this Section.

(d) Following the filing of the findings and recommended order of the Adjudicator or Commissioner and any

written exceptions and responses thereto, and any other proceedings provided for in this Section, the Commission shall review the record and may adopt, modify or reverse in whole or in part the findings and recommendations of the Adjudicator. The Commission shall adopt findings of fact of the Adjudicator or Commissioner contrary to the manifest weight of the evidence. The Commission shall file its written order and decision in its office and serve copies thereof on all parties together with a notification of the date when it was filed.

(e) The Commission may, at any time prior to final order of the Court in a proceeding under Section 10 or 11, upon reasonable notice, modify or set aside in whole or in part any finding or order made by it in accordance with this Section. Any such modification shall be accomplished by the filing and service of a supplemental order and decision by the Commission in the same manner as provided in subsection (d) hereof.

859. Additional powers of the commission—Appearances of witnesses—Service of process

Additional powers of the commission; appearances of witnesses; service of process. For the purpose of all hearings and investigations:

(a) The Chairperson of the Commission shall issue subpoenas on a form prescribed by the Commission, at the instance of the Commission, or of the Commissioner or Adjudicator conducting a public hearing, or at the instance of a respondent or complainant to the proceedings, whenever necessary to compel the attendance of a witness or to require the production for examination of any books, payrolls, records, correspondence, documents, papers or other evidence in any investigation of an unfair employment practice charge or in connection with any hearing before the Commission, or a member thereof, or an Adjudicator. Official signed forms of subpoenas may be obtained from the Commission in accordance with rules and regulations which it may from time to time prescribe.

(b) If any witness resides outside of the State, or through illness or any other cause is unable to testify be-

fore the Comission at the hearing or investigation, his or her testimony or deposition may be taken, within or without the State, in the same manner as is provided for in the taking of depositions in civil cases in circuit courts.

(c) For good cause shown the Commission or an Adjudicator on motion may quash or modify any subpoenas, and in the case of a subpoena duces tecum, issued and served at the instance of the Commission, the Commission shall upon request pay the reasonable expense, as determined by the Commission, of producing or providing any item specified in the subpoena.

(d) In case of failure or refusal to obey a subpoena issued to any person, the Circuit Court of the county in which such person resides or has his or her principal place of business, upon petition by the Commission, and after a hearing on such petition, has jurisdiction to issue an order requiring such person to appear before the Commission, there to produce evidence, if so desired, or there to give testimony touching the matter under investigation or in question. Before petitioning the Court for such order, the Commission shall first serve notice upon such person, not less than 5 days prior thereto, stating the time and place where the petition is to be presented. Failure to obey any order issued by the Court may be punished by the Court as contempt thereof.

(e) Except as otherwise provided in this Act, complaints, orders and other process and proper papers shall be served in accordance with such rules and regulations as the Commission may from time to time prescribe. The verified return of the individual making service in accordance with this Section, and setting forth the manner of such service shall constitute proof of service. Witnesses summoned before the Commission or a member thereof shall be paid the same fees and mileage as are paid witnesses in the Circuit Courts of this State, and witnesses whose depositions are taken or the person taking the same shall severally be entitled to the same fees as are paid for like services in the Circuit Courts of this State.

860. Review under Administrative Review Act

Review under Administrative Review Act. Any complainant or respondent may apply for and obtain judicial review of an order of the Commission entered under this Act in accordance with the provisions of the "Administrative Review Act," approved May 8, 1945, as heretofore or hereafter amended (Ill. Rev. Stat., Ch.110 §264 et seq.); and the Commission in proceedings under this Section may obtain an order of Court for the enforecment of its order.

861. Judicial enforcement

Judicial enforcement. Whenever the Commission concludes that any person has violated a valid order of the Commission issued pursuant to Sections 8, 8.01 and 8.02 of this Act, and the violation and its effects are not promptly corrected, the Commission shall commence an action in the name of the People of the State of Illinois by petition, alleging the violation, attaching a copy of the order of the Commission and praying for the issuance of an order directing such person, his or her or its officers, agents, servants, successors and assigns to comply with the order of the Commission. Upon the commencement of such action the Court shall have jurisdiction of the proceedings and power to grant or refuse, in whole or in part, the relief sought or such other remedy as the Court may deem proper, provided that the Court may stay an order of the Commission in accordance with paragraph (1)(a), Section 12 of the "Administrative Review Act," pending disposition of the proceedings. The Court may punish for any violation of its order as in case of civil contempt. Actions of the Court under this Section shall take precedence over all other matters except matters of the same character.

862. Venue

Venue. The proceedings provided in Sections 10 and 11 shall be commenced in the Circuit Court in and for the county wherein the unfair employment practice which is the subject of the Commission's order was committed and shall be given precedence over all other civil cases except cases arising under the "Workmen's Compensation Act," approved July 9, 1951, as heretofore or hereafter amended

or the "Worker's Occupational Diseases Act," approved July 9, 1951, as heretofore or hereafter amended.

863. Service of process or notice—Sufficiency

For the purposes of this Act, summonses, notices or writs served upon any officer of any labor organization shall be sufficient to acquire jurisdiction against such labor organization, or labor union, or voluntary unincorporated union association, and all of its officers, members and representatives.

864. Operative date

This Act shall apply to all unfair employment practices occuring on or after July 1, 1961.

865. Separability

Separability. If any provision of this Act or the application of such provision to any person or circumstance is held invalid, the remainder of this Act or the application of such provision to persons or circumstances other than those as to which it is held invalid shall not be affected thereby.

866. Short title

Short Title. This Act shall be known and may be cited as the "Fair Employment Practices Act."

367. Utilization of agency and employees by Federal Equal Employment Opportunity Commission—Agreements with federal agencies

The Commission may in its discretion, for the purpose of carrying out its functions, permit the utilization of its agency and employees by the Federal Equal Employment Opportunity Commission in the investigation of charges over which the Illinois Fair Employment Practices Commission has jurisdiction. The Commission shall be authorized to be reimbursed by the Federal Government for the reasonable value of such services rendered.

In order to effect cooperative undertakings in the reduction of unfair employment practices, the Commission has the power and authority for and on behalf of the State to

make contractual agreements, within the scope and authority of this Act, with any agency of the Federal Government, and such agreements may include provisions under which the Federal Equal Employment Opportunity Commission shall refrain from processing a charge in Illinois in any cases or class of cases specified in such agreements.

# In the Supreme Court of the United States

No. 80-5950

LAVERNE L. LOGAN, APPELLANT,

*v.*

ZIMMERMAN BRUSH COMPANY

APPEAL from the Supreme Court of Illinois.

The statement of jurisdiction in this case having been submitted and considered by the Court, in this case probably jurisdiction is noted. The motion of appellant for leave to proceed *in forma pauperis* is granted.

FEBRUARY 23, 1981